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No. 92-1135

In The Supreme Court of the United States

October Term 1992

RICHARD E. GRIFFIN,

Petitioner,

v.

FIRST NATIONAL BANK OF CROSSETT, CROSSETT, ARKANSAS,

Respondent.

Petition for Writ of Certiorari To The Supreme Court of Arkansas

BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT

In its Introductory Statement to its Brief, Respondent attacks Petitioner's request for relief contending that the Petitioner's motion for recusal of the justice in question did not occur until after rendition of the June 29, 1992 opinion. Respondent further complains that Petitioner's request for recusal of the justice in question

was based upon an affidavit from an employee of his counsel. Neither of these contentions are relevant to the resolution of this Petition for Certiorari and are classic "red herrings".

Even though Petitioner's request for disqualification of Special Justice Cearley occurred after rendition of the June 29, 1992 opinion, and after the filing of the Petition for Rehearing with Arkansas Supreme Court, the request for disqualification was nevertheless promptly and timely submitted in accordance with Arkansas law. Although Special Associate Justices Miller and Pinson were appointed on October 4, 1991 and Special Chief Justice Cearley was appointed on December 15, 1991, the letters of appointment from then Governor Bill Clinton were not transmitted to counsel for Petitioner at that time. (See Respondent's Appendices A, B, and C, pp. la-6a, especially carbon copy notations.)

Only on April 13, 1992, the date of oral argument before the Arkansas Court, did counsel for Petitioner learn of the appointment of these three special justices. Moreover, there was no disclosure at any time from Special Justice Cearley of his connection with the Arkansas Bankers' Association. Only in August, 1992, did Petitioner learn of the possible connection between Special Justice Cearley and the Arkansas Bankers' Association. Because of the sensitive nature of the incident, Petitioner and his counsel proceeded promptly but cautiously to verify the relationship between Special Justice Cearley, the Arkansas Bankers' Association, and the Respondent herein.

Arkansas procedure does not permit direct contact with supreme court justices under circumstances such

as those present in this matter. Further there is no Arkansas procedure for obtaining information for use in a disqualification proceeding through depositions or other formal proceedings. In this case, Petitioner's only option was to obtain all relevant facts through an informal investigation and present such facts to the Arkansas court in affidavit form.

The law clerk for counsel for Petitioner contacted the Arkansas Bankers' Association and verified the information supporting Petitioner's disqualification request. The law clerk's affidavit, inter alia, established that (1) Special Justice Cearley had served and was at the time of the affidavit serving as adjunct counsel to the Arkansas Bankers' Association; and (2) Respondent was a member of the Arkansas Bankers' Association at that time.

Although Respondent complains at great length as to the procedure followed by Petitioner herein, Respondent does not in any way challenge or controvert the factual basis of Petitioner's request for relief herein. Accordingly, the facts as set forth in the Petition for Writ of Certiorari must be taken as true for purposes of considering Petitioner's request for relief.

ARGUMENT

1. Justice Cearley's participation in the Arkansas appellate proceedings conferred upon him a sufficiently direct, personal, and substantial benefit so as to violate Petitioner's Due Process Rights.

In its Brief in Opposition, Respondent asserts that no constitutional issue is presented by Justice Cearley's participation in this case. Arguing vigorously that neither Justice Cearley nor his client, the Arkansas Bankers' Association, had any direct stake in the litigation between Petitioner and Respondent, Respondent contends that the Due Process Clause is violated only when a judge has a "direct, substantial, pecuniary interest in the outcome." Respondent's Brief, p. 8. (Emphasis supplied.)

Respondent's argument that Justice Cearley lacks a sufficient direct, substantial, and pecuniary interest in this proceeding is an attempt to distort the majority holding in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). Respondent apparently would have this Court hold that *Aetna* allows a judge having direct, personal, and substantial relationship to a case to participate in the rendition of a decision without violating the Due Process Clause so long as the judge has no pecuniary interest in the outcome. Such a holding is clearly inconsistent with *Aetna* (*see*, *e.g.*, 475 U.S. at 829-830) and this Court's subsequent decision in *Liljeberg v. Health Service Acquisition Corp.*, 486 U.S. 847 (1988).

Significantly, *Liljeberg* totally undercuts the argument advanced by Respondent in its brief. In

Liljeberg, the district judge who was disqualified was a member of the board of trustees of a university which would be positively or negatively affected by the outcome of the litigation to which the university was not a party. In *Liljeberg*, the Supreme Court held that even where the judge had a lack of knowledge of a disqualifying circumstance or had no direct pecuniary interest in the outcome of the case, he still should not participate in the case where there was a risk that "his impartiality might reasonably be questioned." *Supra* at 859. This result was deemed necessary in order to promote public confidence in the integrity of the judicial process. *Ibid.* at 860. Accordingly, in *Liljeberg*, the judge's lack of a direct pecuniary interest in the litigation did not prevent his disqualification. Thus, *Liljeberg* is factually indistinguishable to the case presented herein and the Petition should be granted.

2. Even though Justice Cearley did not cast the deciding vote, his participation in the Arkansas appellate proceedings nevertheless violated Petitioner's Due Process Rights.

Respondent further contends that the Petition should be denied because Justice Cearley voted with the majority in a 5-2 decision. Respondent concludes that since Justice Cearley's vote was not crucial to the decision, no Due Process violation occurred.

Respondent's position is clearly contrary to concurring opinions in *Aetna*, 475 U.S. at 830-33. In his concurring opinion, Justice Brennan states "... I understand that the Court's opinion is not to be read to suggest that the outcome might be different had Justice Embry not provided the necessary fifth vote in the court below.

That fact too is irrelevant — Justice Embry's participation in the court's resolution of the case, while he was fully aware of his interest in the outcome, was sufficient in itself to impugn the decision...." *Ibid.* at 830-831.

Likewise, Justice Blackmun with whom Justice Marshall joined, stated that, "I write separately, however, to stress that the constitutional violation in this case should not depend on the Court's apparent belief that Justice Embry cast the deciding vote — a factual assumption that may be incorrect and, to my mind, should be irrelevant to the Court's analysis. For me, Justice Embry's mere participation in the shared enterprise of appellate decision-making — whether or not he ultimately wrote, or even joined, the Alabama Supreme Court's Opinion — posed an unacceptable danger of subtly distorting the decision-making process." *Ibid.* at 831. As is clearly indicated by the concurring opinions of Justices Brennan and Blackmun, the Due Process Clause is violated where a tainted judge participates in the appellate decision-making process, even where the judge does not necessarily cast the deciding vote.

3. Petitioner's request for recusal was timely made in accordance with Arkansas case law.

Respondent finally contends that Petitioner's request for recusal was not timely filed under Rule 27, *Arkansas Rules of Supreme Court*, since it was raised after rendition of the June 29, 1992 Opinion, and after the Petition for Rehearing was filed. This argument ignores both the facts of this case and applicable Arkansas case law.

Respondent argues that Petitioner's Motion to Disqualify should have been filed shortly after the three special justices were appointed in the fall of 1991. This argument is somewhat misleading in light of the fact that neither Petitioner nor his counsel received notice when the three special justices were appointed by then Governor Bill Clinton. (See Respondent's Appendices A, B, and C; Respondent's Brief, pp. 1a-6a, particularly the carbon copy notations.) In fact, counsel for Petitioner was unaware of these appointments until the oral argument was held before the Arkansas Supreme Court on April 13, 1992. At that time there was no opportunity to conduct an investigation of the three special justices, nor was there any reason to believe that grounds for disqualification existed. Further, if grounds for disqualification of Special Justice Cearley did exist (as is now apparent), it was the duty of Special Justice Cearley to disclose these matters to the parties and to disqualify himself. *See Arkansas Code of Judicial Conduct*, Canon 3(D)(1988).

The facts in this case demonstrate that Petitioner has acted diligently. Petitioner only became aware of the facts giving rise to Justice Cearley's disqualification in August, 1992. Thereafter, Petitioner's counsel immediately conducted an investigation and promptly filed his Motion to Suggest Disqualification and to Vacate Opinion on August 24, 1992. Contrary to Respondent's assertions and in light of the facts in this case, it is appropriate under Arkansas case law for a request for recusal to be filed even after the rendition of the opinion. In *Johnson v. Sturdivant*, 295 Ark. 622, 758 S.W.2d 415 (1988), the Arkansas Supreme Court was faced with a similar disqualification motion wherein the basis for the disqualification of a justice was discovered after the

opinion had been rendered. A strict reading of Rule 27 of the *Arkansas Rules of Supreme Court* should have barred this post-opinion request for relief. Nevertheless, after considering the facts of the case, the Arkansas Supreme Court in *Johnson* vacated its previously rendered opinion and all participating justices stepped aside for a reconsideration of the case. *Ibid.* Thus, Petitioner's request for recusal of Special Justice Cearley was timely made consistent with Arkansas law.

CONCLUSION

The facts and circumstances of this case demonstrate that Petitioner's Due Process rights clearly were violated by the participation of Special Justice Cearley in the Arkansas appellate proceeding. Accordingly, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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